IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	Criminal No. 1:10CR485
JEFFREY ALEXANDER STERLING,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT'S REPLY TO DEFENDANT'S RESPONSE TO GOVERNMENT'S OBJECTION TO THE DEFENDANT'S PROPOSED TESTIMONY PURSUANT TO CIPA SECTION FIVE

The United States of America, by and through the undersigned, respectfully replies to the defendant's *Reply To Government's Objection to the Defendant's Proposed Testimony Pursuant to CIPA Section Five* (Dkt. 208). The defendant has characterized his motion as a reply, when in actuality the initial motion filed by the defendant was nothing more than a notice of the defendant's proposed testimony with absolutely no written discussion or analysis of the relevance of the proposed testimony. In fact, the government had been forced to base its opposition to the defendant's proposed testimony upon an oral representation by defense counsel. Accordingly, now that the defendant has responded in writing and attempted to justify the relevance of the defendant's proffered testimony regarding classified information, the government respectfully requests the leave of this Court to file this reply to the defendant's most recent pleading.

The defendant's opposition should be denied. As the defendant's reasoning for the admission of his proffered testimony continues to shift, the defendant's most recent justifications for admitting his testimony about unrelated classified activity on which he may have worked during his career at the CIA – that he should be entitled to put his entire career at the CIA in its

proper context, and to rebut the government's introduction of the administrative and civil litigation with the CIA – remains deficient under Section 5. The defendant has not demonstrated how the specific acts of each and every classified activity set forth in his proffered testimony is relevant to the present charges. Moreover, the sweeping justifications for the defendant's proffered testimony make his testimony no more admissible under Rule 403 today than it had been when first noticed pursuant to Section 5.

I. Multiple Courts of Appeals Have Rejected A Defendant's Attempt To "Greymail" The Government Through The Testimony Of A Defendant Who Wants To Discuss The Specific Details Of Unrelated Classified Activity.

The defendant's attempt to "greymail" the government through proffered testimony about specific details of unrelated classified activities in which he may have been involved during his career is no different than what various courts of appeal have rejected. For example, in *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984), the defendant, who had been charged with plotting the death of prosecutors and witnesses in several underlying felony cases, wanted to testify about certain covert activities of the United States in which he claimed to have participated during the years that the underlying felonies took place. According to the defendant, his participation in those covert activities warranted a belief that federal authorities would not allow him to be sentenced and imprisoned, and thus he had no motive to tamper with witnesses. *Id*. In addition, the defendant claimed that his participation in the specific covert activities was evidence of certain character traits and personal relationships that would tend to disprove the charged crimes. *Id*.

The Second Circuit affirmed the district court's decision to only permit testimony about the fact of his employment and the fact of his involvement in covert operations on behalf of the

United States. *Id*. The Court agreed with the district court that testimony about the specific details of the covert operations would cause "undue delay, waste of time, and needless presentation of cumulative evidence" and thus was inadmissible under Rule 403. *Id*. In addition, the Second Circuit ruled that the defendant's testimony about the specific details of covert operations was inadmissible under Rule 405 as improper character evidence. *Id*.

Similarly, in *United States v. Miller*, 874 F.2d 1255, 1276 (9th Cir. 1989), the defendant, who had consented to the search of his two residences and his work desk, sought to admit all of the classified documents found at the search locations. The defendant asserted that he wanted to present a "pack rat" defense, and that the jury could not fairly evaluate his defense without seeing all of the seized classified documents, which the defendant deemed relevant for that reason. *Id*. While the district court acknowledged that the "pack rat" defense was a viable defense, the district court ruled that the defendant could not introduce all of the documents in a wholesale fashion, but rather would be required to specify with greater particularity which documents or portions of documents were relevant. *Id*.

The Ninth Circuit affirmed the district court's decision, agreeing that the defendant had "failed to show that the contents of all of these documents were relevant to his defense." *Id*. The Ninth Circuit also agreed that "introduction of the entire contents of all of the documents might confuse and mislead the jury and waste the court's time." *Id*.

Finally, in *United States v. Doyle*, 130 F.3d 523, 541 (2nd Cir. 1997), the defendant contended that the district court had denied him a fair trial by refusing to allow him to subpoena United States Army Intelligence agents for whom the defendant had worked during the period of the charged conspiracy and by excluding trial testimony "relating to specific actions against

Libya which [the defendant] allegedly took in cooperation with the U.S. Army Intelligence Agency to promote the U.S. security policy toward Libya." The defendant contended that this evidence, as well as technical documents concerning Libya that he provided to the intelligence agents, would have corroborated his "good faith' defense to illegal exportation charges and rebutted the essential elements of knowledge and intent because this evidence would have "shown that he did not knowingly act contrary to United States policy towards Libya." *Id.* After a hearing on the matter, the district court ruled that the defendant could "testify as to the facts of his life history and employment including any relationship with U.S. intelligence agencies, but found that testimonial and documentary evidence of specific acts taken by [the defendant] in cooperation with army intelligence were either not relevant to or inadmissible at this trial." *Id*.

The Second Circuit affirmed the district court, agreeing that the defendant's "past cooperation with army intelligence had no bearing on the crimes charged, or that any probative value was substantially outweighed by the risk of confusing the jury with extraneous matters, or of wasting the court's and jury's time." *Id*. at 542. The Second Circuit further agreed that the evidence of specific acts of cooperation was inadmissible under Rule 405 because "[c]haracter is not an element of any of the crimes with which [the defendant] was charged." *Id*. The Court stated that the defendant's argument that "character was an element of these charges, because 'he was charged . . . with intending to violate a national security policy of the United States[,]' distorts Rule 405 beyond recognition." *Id.* The Second Circuit agreed with the trial court that "if specific good deeds could be introduced to disprove knowledge or intention, which are elements of most crimes, the exception of Rule 405(b) would swallow the general rule of 405(a) that proof of specific acts is not allowed." *Id*. *See also United States v. Al Kassar*, 582 F.Supp.2d 498, 500

(S.D.N.Y. 2008) (excluding admission of classified evidence of prior contacts between the defendants and government officials involving wholly unrelated events).

The defendant's opposition remains deficient under Section 5. In his opposition, the defendant does not specify how each and every classified activity listed in the defendant's proffered testimony is relevant to any of the charged crimes. In fact, the defendant's opposition does not even attempt to make the showing required of him, presumably because it is impossible to make the required showing of relevance given that each and every itemized classified activity is wholly unrelated to the present charges. Instead, the defendant rests on broad and sweeping generalizations regarding the purported relevance of his testimony.

The first purported justification for the defendant's testimony about specific classified activity in which he may have been involved is to give proper context to his career at the CIA. Of course, this justification suffers from a number of infirmities. The first problem is one of relevance and demonstrating that the prejudicial value of such testimony does not substantially outweigh its probative value. Putting his career into "context" has marginal, if any, probative value, and introducing evidence of other, wholly unrelated classified activity will confuse and mislead the jury and waste time over irrelevant matters.

Second, the defendant has not identified how the proposed substitutions offered by the government does not achieve the same objective. If the defendant's concern is that the jury may believe that the defendant only worked on Classified Program No. 1, then the defendant has not identified how the government's agreement to allow the defendant testify about his life history, the fact of his employment at the CIA, and the fact that he worked on other classified matters does not achieve that purpose. The government's proposal allows the defendant to put his CIA

career in context and finds full support in the caselaw. *See United States v. Wilson,* 721 F.2d 967, 975 (4th Cir.1983) (affirming district court's decision to allow the defendant to present his defense "that he was working for the United States in an undercover capacity in Libya, and to call witnesses to corroborate this claim, so long as none of the classified information determined to be irrelevant would be disclosed thereby."). The government's proposal here is no different.

In effect, the defendant's argument really amounts to a claim that because he is the defendant, he is somehow entitled to testify about whatever he wants while on the stand, and the Rules of Evidence do not apply to him. Of course, such an argument is "greymail" in its purest form, is an untenable position unsupported by any caselaw, and effectively self-immunizes any defendant charged with having disclosed classified information from prosecution. This Court cannot countenance such an argument. *See, e.g., Wilson,* 721 F.2d at 975 ("[s]uch an unwarranted extension of the good faith defense would grant any criminal *carte blanche* to violate the law should he subjectively decide that he serves the government's interests thereby. Law-breakers would become their own judges and juries."). *See also United States v. Giffen,* 473 F.3d 30, 43 (2d Cir. 2006).

The second sweeping rationale for the defendant's testimony about the specific details of the enumerated classified activity in his proffered testimony is that the defendant needs to rebut the government's introduction of facts concerning his administrative and civil litigation with the CIA. Yet once again, the defendant does not specify how each and every classified activity listed in his proffered testimony is relevant to his administrative and civil litigation. And, as noted above, the defendant's opposition does not even attempt to make such a showing, again most likely because it is impossible to demonstrate how this wholly unrelated classified activity was

relevant to his administrative or civil litigation or the present charges. The defendant makes no showing that this wholly unrelated classified activity made it more likely or less likely that he suffered discrimination, and, even if it did, such evidence is irrelevant to the present charges. Introduction of the specific details of wholly, unrelated classified activity solely to combat the fact of his administrative and civil litigation will result in a mini-trial within the trial, and cause "undue delay, waste of time, and needless presentation of cumulative evidence" under Rule 403.

The defendant claims that his proffered testimony about unrelated classified activity is not character evidence, but given its lack of relevance, the defendant's statement only begs the question of what it is evidence of. Instead, the defendant's proffered testimony makes transparent the defendant's attempt to re-litigate his former discrimination claim against the CIA case through this criminal case and inject a "good deeds" or a "good character" defense into this criminal case. The Court should not tolerate the defendant's attempt to do so and bar any such evidence.

II. Conclusion

Based upon the foregoing, the Government requests that the Court grant its motion to strike the proffered testimony of the defendant under Section 6 of the Classified Information Procedures Act.

Respectfully submitted this 27th day of September, 2011.

Respectfully submitted,

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